BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	**WC Docket No. 07-245**
Amendment of the Commission's Rules	)	
and Policies Governing Pole Attachments	)	**RM-11293**
	)	**RM-11303**
	)	

INITIAL COMMENTS OF FLORIDA POWER & LIGHT TAMPA ELECTRIC AND PROGRESS ENERGY FLORIDA REGARDING SAFETY AND RELIABILITY

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Florida Power & Light Company ("FPL"), Tampa Electric Company ("TECO"), and Progress Energy Florida, Inc. ("PEF") (collectively the "Florida IOUs") respectfully file these initial comments to the Notice of Proposed Rulemaking ("NPRM") published in the Federal Register by the Commission on February 6, 2008, and subsequently corrected on February 12, 2008. These initial comments focus exclusively on the safety and reliability implications of the NPRM.[1]

I. INTRODUCTION

A. Summary of Comments

The NPRM broadly seeks comment "on practices of attachers that have the potential to adversely impact the safety and reliability of an integral component of our nation's critical infrastructure, our electric power system."[2] While the Florida IOUs have a substantial interest in many, if not all, of the numerous issues set forth in the NPRM, these initial comments focus on the areas of greatest importance and concern to the operation and management of electric distribution systems – safety and reliability. The Florida IOU's share in Chairman Martin's view that "the safety and reliability of critical infrastructure is a paramount concern."[3]

Specifically, the Florida IOUs urge the Commission to decline the invitation to enact any rules of general applicability which purport to micromanage issues of safety, reliability and engineering. Matters of safety, reliability and engineering are inherently state-specific, and in some instances utility-specific, as evidenced by the recent experiences of the Florida IOUs in the nearly two-year Storm Hardening proceedings at the Florida Public Service Commission

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[1] Florida Power & Light Company ("FPL") and Tampa Electric Company ("TECO") are also submitting a separate set of initial comments addressing issues raised in the NPRM relating to jurisdiction over ILEC attachments on electric utility poles and pole attachment rate formulas.

[2] *NPRM*, 22 FCC Rcd 20195, ¶ 38 (Nov. 20, 2007).

[3] *NPRM*, Statement of Chairman Kevin J. Martin

("FPSC"). Any such rules of universal applicability would undermine the FPSC's and Florida IOUs' ability to manage their electric distribution systems the way they need to be managed. To be clear, the Florida IOUs are *not* asking the Commission for unfettered discretion in applying their standards. Instead, the Florida IOUs are asking the Commission to limit its role in these matters to ensuring, as it is presently doing, that an individual utility's safety, reliability and engineering standards are applied in a non-discriminatory fashion on an *ad hoc* basis.

These comments also address the safety and reliability implications of unauthorized attachments. The Florida IOUs urge that the route to solving the problem of unauthorized attachments is *not* through additional Commission involvement, but instead by the Commission allowing electric utilities to enforce their pole attachment agreements. Finally, these comments address certain specific access-related issues raised in connection with the *Fibertech Petition*, and urge the Commission *not* to adopt rules which could compromise the safety and reliability of the electric distribution systems.

B. The Florida IOUs

FPL is an investor owned electric utility headquartered in Miami, Florida. FPL's service territory covers approximately 27,650 square miles, including the entire east coast of Florida, as well as certain parts of Florida's west coast south of Tampa.[4] FPL serves approximately 4.5 million customers in 35 counties, and owns 1.14 million distribution poles.[5] More than 760,000 (almost 67%) of these poles are impacted by third party attachments.[6]

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4 *See* Declaration of Thomas J. Kennedy ¶ 2 (attached as Exhibit 1).

5 *See* Kennedy Decl. at ¶2.

6 *See id.*

TECO, headquartered in Tampa, Florida, has supplied the Tampa Bay area with electricity since 1899.[7] Its West Central Florida service area covers 2,000 square miles, including all of Hillsborough County and parts of Polk, Pasco and Pinellas counties.[8] TECO serves nearly 670,000 residential, commercial and industrial customers.[9] TECO has approximately 312,500 distribution poles, 212,000 of which are impacted by third party attachments.[10]

PEF is an investor owned electric utility headquartered in St. Petersburg, Florida.[11] PEF's service territory covers more than 20,000 square miles in 35 counties in Florida, ranging from the Georgia/Florida border to Central Florida.[12] PEF serves more than 1.7 million customers and owns approximately 1.1 million distribution poles. 510,235 of these poles are impacted by one or more third party attachments.[13]

II. THE FLORIDA STORM HARDENING PROCEEDINGS

Following the extraordinary 2004 and 2005 hurricane seasons, the FPSC undertook a multi-pronged approach to improve the electric infrastructure in Florida. In its earliest orders, the FPSC noted the impact of third party attachments on the safety and reliability of electric infrastructure. For example, in its February 27, 2006 "Eight-Year Pole Inspection Cycle" Order, the FPSC noted:

> Factors such as electrical and non-electrical pole attachments impose additional strength requirements that are considered at the time the pole is installed. Of course, many pole attachments occur

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7 *See* Declaration of Kristina L. Angiulli ¶ 2 (attached as Exhibit 2).

8 *See* Angiulli Decl. at ¶ 2.

9 *See id.*

10 *See id.*

11 *See* Declaration of Scott Freeburn ¶ 2 (attached as Exhibit 3).

12 *See* Freeburn Decl. at ¶ 2.

13 *See id.*

> well after the date of pole installation .... We believe that third parties have completed pole attachments to electric IOU wood poles that were done without full consideration of [NESC loading evaluation requirements.][14]

Similarly, in its April 25, 2006 "Ten-Point Initiative" Order, the FPSC stated:

> Each investor-owned electric utility shall develop a plan for auditing joint-use agreements that includes pole strength assessments .... The location of each pole, the type and ownership of the facilities attached, and the age of the pole and attachments to it should be identified.[15]

In the same Order, the FPSC decided: "Rulemaking will be initiated to adopt distribution construction standards that are more stringent than the minimum safety requirements of the National Electric Safety Code."[16]

Following months of language development and revision, through workshops and negotiations, with participation by all affected parties (including the Florida Cable Telecommunications Association, on behalf of its member cable operators), the FPSC approved new storm hardening rules which require electric utilities to submit Storm Hardening Plans for approval by the FPSC.[17] The new rules provide, in pertinent part:

> Attachment Standards and Procedures: As part of its storm hardening plan, each utility shall maintain written safety, reliability, pole loading capacity, and engineering standards and procedures for attachments by others to the utility's electric transmission and distribution poles (Attachment Standards and Procedures). The Attachment Standards and Procedures *shall meet or exceed* the edition of the National Electric Safety Code that is applicable ... so as to assure, as far as is reasonably practicable, that third-party facilities attached to electric transmission and distribution poles do not impair electric safety, adequacy, or pole reliability; do not exceed pole loading capacity; and are

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14 Order No. 06-0144 PPA-EI, Docket No. 060078-EI.

15 Order No. PSC-06-0351-PAA-E1, Docket No. 060198-EI.

16 *Id.* at 2.

17 Fla. Admin. Code, Rule 25-06.0342(2)

> constructed, installed, maintained, and operated in accordance with generally accepted engineering practices *for the utility's service territory*. ...[18]

Pursuant to this requirement, the Florida IOUs submitted Storm Hardening Plans for the FPSC's approval. These plans, which contained varied standards and approaches to storm hardening, were approved by the FPSC (following hearing in October 2007) in December 2007.[19] The overarching theme of the FPSC's inquiry into third party attachments (and in turn the safety and reliability standards implemented by the Florida IOUs) was "pre-engineering" – everything on a pole should be engineered to be there. Thus far, the processes appear to be working for the benefit of all (pole owners, attachers and customers). But the positive momentum could be compromised by Commission action that undermines the implementation of the Storm Hardening Plans.

III. THE COMMISSION SHOULD NOT ADOPT A "ONE-SIZE-FITS-ALL" APPROACH TO DISTRIBUTION SAFETY AND RELIABILITY STANDARDS

The Commission seeks comment on "the extent safety codes, such as the National Electrical Safety Code, should apply to all attachers" and whether "specific enforceable safety requirements should be adopted."[20] The Florida IOUs urge the Commission *not* to adopt a "one-size-fits-all" approach to safety, reliability and engineering standards. Matters of safety and reliability are best addressed by individual utility standards in concert with a utility's state regulatory commission.[21] The Florida Storm Hardening proceedings are a perfect example of a state's exercise of authority over the safety and reliability of electric distribution systems, and

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18 Fla. Admin. Code, Rule 25-06.0342(5)(emphasis added).

19 Order Nos. PSC-07-1020-FPF-EI (December 28, 2007); 07-1033-FOF-E1; 07-0301-FOF-E1.

20 *NPRM*, ¶ 38.

21 *See, e.g.*, Fla. Stat. Ann. § 366.04(5)(granting the FPSC authority "to regulate planning, development and maintenance of a coordinated electric power grid ... to assure an adequate and reliable source of energy"); § 366.04(6)("to prescribe and enforce safety standards for transmission and distribution facilities of electric utilities").

illustrate the potential conflict which would arise in the event the Commission oversteps its jurisdiction and regulates in an area where it admittedly lacks expertise.[22]

A. Many Factors Impact Development of Standards

Third party attachment standards, which apply to attachers within the Commission's jurisdiction as well as attachers outside the Commission's jurisdiction, do not exist in a vacuum. They are part in parcel of an electric utility's overhead distribution construction standards.[23] Each utility faces safety and reliability concerns common to other utilities, but also faces distinct, utility-specific concerns. Accordingly, standards may vary from utility to utility.

Many factors go into the development and evolution of a utility's standards, such as the utility's history and its experiences, as well as the climate and geography of a utility's service territory.[24] What works for one region may not work for another. For example, Florida's lightning and hurricane vulnerability is unique. Other regions are affected by different weather events such as ice storms or tornadoes. These differences not only warrant different construction design, but also impact the speed that the poles in any given area can be restored. The Florida IOUs themselves have standards that differ from each other. As explained below, FPL has

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[22] Prior to the enactment of the Pole Attachment Act of 1978, a representative of the Commission testified that the Commission lacks expertise in "utility regulation" and argued that such matters would be better handled by the states. *See* House Report 95-721, at pp. 6-7 Oct. 19, 1977; *see also Arkansas Cable Telecom. Assoc. v. Entergy Arkansas, Inc.*, 21 FCC Rcd 2158, 2161 (2006) ("In adopting rules governing pole attachments, the Commission expressly declined to establish a comprehensive set of engineering standards that would govern when a utility could deny access to its poles based on capacity, safety, reliability, or engineering concerns."); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16073 (1996) ("In addition to operating under federal, state, and local requirements, a utility normally will have its own operating standards that dictate conditions of access. Utilities have developed their own individual standards and incorporated them into pole attachment agreements because industry-wide standards and applicable legal requirements are too general to take into account all of the variables that can arise."); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16073 (1996) **("[W]e conclude that state and local requirements affecting attachments are entitled to deference even if the state has not sought to preempt federal regulations under section 224(c).").**

[23] *See* Angiulli Decl. at ¶ 5; Freeburn Decl. at ¶ 5; Kennedy Decl. at ¶ 5.

[24] *See id.*

adopted an extreme wind loading ("EWL") distribution construction standard, while TECO has adopted Grade B.[25]

B. The NESC Is Neither A Construction Manual Nor A "Ceiling" For Safety Standards

The NPRM seeks comments on whether "safety codes, such as the National Electrical Safety Code, should apply to all attachers, and whether the Commission's enforcement authority can or should be used to address alleged violations of such codes."[26] While the NESC provides a good baseline, it cannot serve as the ceiling for safety requirements. Moreover, the NESC is not a construction manual. Reliability concerns -- independent from safety considerations -- may warrant standards that exceed the NESC.[27] This position is supported by the express language of the NESC. Section 010 of the NESC provides:

> These rules contain the *basic* provisions that are considered necessary for the safety of employees and the public under the specified conditions. This Code is *not intended as a design specification or as an instruction manual.*[28]
>
> For all particulars not specified in these rules, construction and maintenance should be done in accordance with accepted good practice for the given *local conditions* known at the time by those responsible for the construction and maintenance of the communication or supply lines and equipment.[29]

Furthermore, the NESC Handbook provides:

> Where *the local conditions* differ in some particular way from those specified in the NESC, it is the responsibility of the appropriate party to *recognize the differences in conditions with actions that constitute good practice under such different conditions.* Such practice may be reflected in the design of the

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25 *See* Angiulli Decl. at ¶ 5; Kennedy Decl. at ¶ 5.

26 *NPRM*, ¶ 38.

27 While the areas of "safety" and "reliability" have some overlap, these areas also implicate different concerns.

28 Rule 010 (emphasis added).

29 Rule 012 (emphasis added).

> installation, the construction practices, the maintenance practices, the operating practices, or some combination of the above, as applicable for the given local conditions. ... The NESC is a performance code, *not a set of design specifications*. The NESC construction rules specify what is to be performed, not how it is to be accomplished.[30]

Under the FPSC's Hardening Rules, the NESC is a *minimum* standard. The Rules require that third party attachment standards must meet "or exceed" the NESC, which clearly contemplates that standards may (and in some cases, should) be more strict than those set forth in the NESC. The Storm Hardening Plans submitted by the Florida IOUs, in fact, contain standards (applicable to third party attachment and overhead construction, generally) which exceed the NESC. For example, FPL's Storm Hardening Plan contains EWL construction for all critical infrastructure, new construction, major planned work, relocation projects, and daily work activities, whereas the NESC requires only Grade C.[31] TECO's Storm Hardening Plan contains Grade B construction with EWL projects. The State Department of Transportation (in whose right of way many electric utility poles are placed) may also have guidelines that exceed the NESC. One example of these differences is minimum grade clearance (the minimum height above ground, for mid-span clearances, at which attachments can be made).

The materials used for distribution system construction can also impact standards.[32] From a materials management perspective it is much more efficient to purchase limited types of hardware and equipment that can accommodate multiple construction applications.[33] The ability to use one piece of hardware, tool, or electrical equipment for a variety of construction types

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30 *NESC Handbook*, commentary on NESC Rule 010 (Purpose), p. 3.

31 *See* Kennedy Decl. at ¶ 8.

32 *See* Freeburn Decl. at ¶ 6.

33 *See id.*

reduces inventory, engineering, and construction cost.[34] These cost efficiencies ultimately benefit third party attachers, as well, directly in the form of reduced make ready costs and indirectly through the pole attachment rates.

Further, the Florida IOUs' existing joint use and pole attachment agreements contain standards that exceed those set forth in the NESC.[35] Third party attachment standards are merely a subset of overhead distribution standards. They cannot be isolated from the bigger picture of overhead distribution system safety and reliability.

C. The Commission Should Act Only Pursuant To Its Statutory Authority And Within Its Sphere Of Regulatory Expertise

The purpose of Section 224(f) of the Act was never to grant the Commission the authority to micro-manage safety, reliability or engineering of an electric distribution system. This is evident by the fact that Section 224(f) devises no specific jurisdiction in the Commission with respect to access, safety or reliability, unlike the language set forth in Section 224(b) which explicitly grants the Commission authority "to regulate rates, terms, and conditions for pole attachments." Furthermore, the Commission is not in the best position to determine the appropriate standards of construction for an electric distribution system. The Commission lacks the expertise necessary to determine matters involving capacity, safety, engineering standards or other matters related to the complexity and reliability of the electric distribution system.[36]

The Commission fulfills its role with respect to safety and reliability standards only pursuant to the complaint procedures set forth in Commission's rules and on a case-by-case basis. It is not the Commission's role to determine whether the actual standards are the best engineering practices, but only whether the application of the standards is being conducted in a

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34 *See id.*

35 *See* Angiulli Decl. at ¶ 6; Freeburn Decl. at ¶ 6; Kennedy Decl. at ¶ 6

36 *See supra*, note 22.

non-discriminatory fashion. Furthermore, as a result of the Storm Hardening proceedings, the Florida IOUs and all third party attachers agreed to a specific "Process to Engage Third Party Attachers" under which third party attachers receive advance notice of projects implementing the Storm Hardening Plans, with opportunity to address safety, reliability and engineering concerns at the operational level (where such concerns are best addressed).

To the extent third party attachers take issue with the implementation of the Florida IOUs Storm Hardening Plans, and cannot resolve these issues within the "Process to Engage Third Party Attachers," the FPSC created a specific Dispute Resolution provision:

> Dispute Resolution: Any dispute or challenge to a utility's storm hardening plan, construction standards, deployment strategy, Attachment Standards and Procedures, or any projects implementing any of the above by a customer, applicant for service, or attaching entity shall be resolved by the Commission.[37]

While the FPSC noted that its Storm Hardening Rules were not "intended to conflict" with the Commission's "jurisdiction over pole attachments," there is a clear distinction between the regulatory purviews of the State (safety, reliability and engineering) and the Commission (rates, terms and conditions).[38]

IV. UNAUTHORIZED ATTACHMENTS

The Commission seeks comment on the "prevalence" of unauthorized attachments and "whether the Commission's existing enforcement mechanisms are sufficient to address any unlawful practices by attachers and ensure the safety and reliability of critical electric infrastructure."[39] The FPSC also has noted the safety and reliability consequences of

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[37] Fla. Admin. Code Rule 25-06.0342.

[38] *Compare* 47 U.S.C. § 224(b)(1)(conferring broad jurisdiction over rates, terms and conditions: "The Commission shall regulate the rates, terms, and conditions for pole attachments") *with* § 224(f)(requiring utilities to grant access to poles, subject to "insufficient capacity, and for reasons of safety, reliability and generally applicable engineering purposes" without a specific grant of jurisdiction as in (b)(1)).

[39] *NPRM*, ¶ 38.

unauthorized attachments in its Storm Hardening Orders, as well as its requirements for annual reporting of the number of unauthorized attachments detected through system audits.

A. The Problem

An unauthorized attachment is any attachment made to the pole without the approval of the pole owner. Each of the Florida IOUs has a permitting process the attacher must follow before attaching to a pole.[40] These processes are set forth in the pole attachment agreements, as well as the Florida IOUs' Third Party Attachment Standards and Procedures required by the FPSC.[41] The fundamental purpose of these processes is to allow the Florida IOUs an opportunity to "pre-engineer" for the attachment in order to preserve the safety and reliability of the distribution system.[42] The permitting process minimizes the incidence of clearance and loading violations, both of which can adversely impact the safety and reliability of the distribution system.[43] Though the clearance requirements are of great importance, the loading requirements are of even greater concern since these can impair the structural integrity of a pole line if not properly engineered.[44] Overlashing, even though not technically considered an "attachment" by the Commission, presents similar pole loading concerns (along with clearance concerns, particularly at mid span).[45]

The Pole Attachment Act itself presumes such processes by giving electric utilities the explicit right to deny access "where there is insufficient capacity and for reasons of safety,

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40 *See* Angiulli Decl. at ¶ 8; Freeburn Decl. at ¶ 8; Kennedy Decl. at ¶ 9.

41 *See id.*

42 *See id.*

43 *See id.*

44 *See id.*

45 *See id.*.

reliability and generally applicable engineering purposes."[46] The Florida IOUs' pole attachment agreements include specific provisions addressing unauthorized attachments. These provisions require payment of back rent (plus interest), payment of penalties, or some combination of the two. For example, PEF's pole attachment agreements require, upon discovery of unauthorized attachments: (1) payments of back rent, plus interest for five years or since the previous audit (whichever is shortest); and (2) a $25 fee for each unauthorized attachment in excess of ten attachments or 2% of the last verified total number of attachments (whichever is greater).[47] This 2% "forgiveness" provision prevents attachers from paying a penalty charge merely because of minor counting discrepancies.[48]

PEF's last audit (conducted every five years, most recently in 2006) revealed 33,350 unauthorized attachments.[49] Many of these unauthorized attachments have created clearance and loading violations. FPL audits its system on a five year revolving basis (20% per year).[50] The 2007 audit revealed 1,798 unauthorized attachments.[51] TECO's last full audit (in 2001) revealed over 26,000 unauthorized attachments (accumulated over a fourteen year period).[52] Electric utilities cannot be certain that their distribution systems are safe and reliable so long as there are attachments of unknown number and size/weight, for which the system has not been specifically engineered.

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46 47 U.S.C. § 224(f)(2). How else would an electric utility exercise this right without a pre-attachment process?

47 *See* Freeburn Decl. at ¶ 9.

48 *See id.*

49 *See id.* at ¶ 10.

50 *See* Kennedy Decl. at ¶ 10.

51 *See id.*

52 *See* Angiulli Decl. at ¶ 10.

B. The Solution

The Commission can decrease the prevalence of unauthorized attachments by allowing pole owners to enforce their agreements. Most agreements have good and reasonable enforcement mechanisms which, if enforced, should deter unauthorized attachments. By the same token, the agreements also typically contain provisions to protect attachers from unduly burdensome impacts (such as notice requirements and cost controls). Many agreements even have "forgiveness" thresholds on the unauthorized attachment penalty provisions (like the PEF provision referenced in part IV.A., *supra*) to avoid the assessment of penalties for the inherent difficulties in counting tens or hundreds of thousands of attachments. However, when the circumstances require, pole owners must have the ability to impose meaningful financial penalties to serve as a deterrent to unauthorized attachments. If the Commission is serious about curing safety and reliability concerns arising from unauthorized attachments, and there is no showing of discriminatory treatment, how could any penalty be too severe (especially one with a "forgiveness" threshold) if it is meant to protect the nation's critical electrical infrastructure?

Current Commission policy appears to disfavor enforcement of unauthorized attachment penalties in pole attachment agreements. In at least two specific cases addressing unauthorized attachments, the Commission has limited pole owners to recovery of back rent, plus modest interest – what the Commission describes as "compensatory damages."[53] While the Florida IOUs recognize that the Commission's holdings in these two cases are not rules of general

[53] *See In the Matter of Mile Hi Cable Partners, LP, et al v. Public Serv. Co. of Colorado*, 17 FCC Rcd. 6268 (2002) (discussing penalties for unauthorized attachments and stating that "there is no basis in the record to support a conclusion that Respondent is entitled to exemplary or punitive damages beyond compensatory damages"); *see also Salsgiver Commc'ns, Inc. v. North Pittsburgh Telephone Co.*, Memorandum Order and Opinion, EB-06-MD-004 (Nov. 26, 2007) (holding that a $250 unauthorized attachment penalty was unreasonable and limiting recovery for unauthorized attachments to compensatory damages).

applicability, they still undermine a utility's ability to enforce the unauthorized attachment provisions in its pole attachment agreements.

If the Commission's policy with respect to unauthorized attachments is, in fact, an "economic loss only" paradigm, attachers have absolutely no incentive to follow the attachment processes. In fact, there is a *disincentive* to follow the attachment procedures because of the time (speed to market) and money (potential make ready costs and engineering fees) saved by violating the procedures. When the violating attachers are finally caught, the "economic loss only" model puts them in no worse a position than had they complied with the process in the first place. Until the Commission allows pole owners to enforce their pole attachment agreements, it cannot expect the prevalence of unauthorized attachments to improve.

V. SPECIFIC ACCESS ISSUES RAISED IN THE *FIBERTECH PETITION*

The NPRM seeks comment on the access concerns raised in the Fibertech Petition, as well as "any other pole attachment access concerns."[54] The Florida IOUs take this opportunity to address six specific issues raised by various attaching entities in connection with the *Fibertech Petition*: (1) wireless pole top access; (2) boxing and bracketing; (3) make ready timelines; (4) use of third party contractors for electric make-ready work; (5) manhole access; and (6) access to utility records.

A. Wireless Pole Top Access

The Wireless Telecom Carriers have asked the Commission to find that pole top wireless attachments are presumptively reasonable and that utilities should not be able to deny access for

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[54] *NPRM*, ¶ 37.

pole top attachments.[55] For example, NextG Network, Inc. states in its comments to the Commission that:

> [T]he Commission should adopt a specific, explicit rule establishing a presumption that pole top attachments for wireless attachments are allowed. To rebut the presumption, a pole owner should be required to obtain an order from the Commission based on conclusive evidence of insufficient capacity or safety, reliability, and generally acceptable engineering purposes that cannot be remedied through make ready, pole expansion or change out at the attaching party's expense, or other engineering solutions that are acceptable under generally applicable engineering or safety standards. The rule should state that the internal policy of a utility cannot be the basis for denying a pole top attachment.[56]

There are at least three reasons the Commission should decline adopting such a rule. First, the Commission lacks jurisdiction to do so. Second, any presumption favoring wireless pole top access threatens the safety and reliability of the distribution system. Third, the burden such a rule would shift to the pole owner is both unlawful and contrary to the Commission's existing rules. To be clear, the Florida IOUs are not asking for a presumption that wireless attachers *cannot* attach to pole tops. Rather, the Florida IOUs ask the Commission not to adopt the wireless telecom carriers' proposed presumption, which would grant wireless attachers virtually automatic access to pole tops.[57]

1. The Commission Does Not Have Jurisdiction to Mandate Pole Top Access for Wireless Attachments

Congress's initial decision, in 1978, to allow the Commission to exercise a certain level of jurisdiction over the facilities owned by electric utilities was based on the fact that some

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[55] *See* T-Mobile USA's Notice of Ex-Parte Presentation in RM-11303 (Sept. 21, 2006); Reply Comments of Clearlinx Network Corporation, LLC in RM-11303 (Mar. 1, 2006); Comments of NextG Network, Inc. in RM-11303 (Jan. 30, 2006).

[56] Comments of NextG Network, Inc. in RM-11303 at 12 (Jan. 30, 2006).

[57] The Florida IOUs generally allow wireless attachments in the communications space. *See* Angiulli Decl. at ¶ 11; Kennedy Decl. at ¶ 11.

electric utilities had decided to "participate in the provision of communications space on [their] utility poles."[58] According to the Commission, the legislative history of the Act evidenced Congress's intent for the Commission to regulate the pole attachment practices of electric utilities if space on their poles has been designated for communications use.[59] Specifically, the Commission stated:

> [O]ur role is to begin only where space on a utility pole has been designated and is actually being used for communications services by wire or cable.... In other words, where a utility owns or controls a pole on which there has been no designation of communications space, jurisdiction to require access will not lie.[60]

Under this precedent, the Commission has no authority to require an electric utility to grant access to space on its poles that is not being used for communications functions. This is consistent with other Commission precedent stating that the "underlying purpose" of Section 224 is "to assure that *communications space on utility poles* be made available to cable systems at 'just and reasonable rates, and under just and reasonable terms and conditions.'"[61]

2. A Presumption Favoring Pole Top Access for Wireless Antennae Threatens the Safety and Reliability of the Distribution System

Even if the Commission did have the jurisdiction to adopt a presumption allowing pole top access for wireless attachments, it should not exercise that jurisdiction, as it would unduly

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[58] S. Rep. No. 580, 95th Cong., 1st Sess., at 15 (1977). Specifically, Congress explained that FCC may regulate an electric utility's pole attachment arrangements when: (1) the electric utility "shares its pole with a telephone company or other communications entity; and (2) a cable television system shares the communications space on the pole with the telephone utility or other communications entity, or occupies the communications space alone." *Id.*

[59] *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 FCC2d 1585, 1593 (1978).

[60] *In the Matter of Cable Information Services, Inc. v. Appalachian Power Company*, 81 FCC2d 38, at 15-16 and n.8 (1980) (emphasis added); *see also In the Matter of David Bailey v. Mississippi Power & Light Company*, 1985 FCC LEXIS 2617 ("Since MPLC has designated communications space on its poles and has permitted Fayette Cable to utilize this space for CATV attachments, the necessary nexus exists for the Commission to exercise jurisdiction over MPLC's pole attachment practices.").

[61] *In the Matter of Gulfstream Cablevision of Pinellas County, Inc. v. Florida Power Corporation*, 1985 FCC LEXIS 4123 (citing S. Rep. No. 95-580) (emphasis added).

restrict a utility's ability to deny access for reasons of safety, reliability, and engineering concerns under Section 224(f)(2). Additional facilities in the power supply space (which includes pole tops) would make it more dangerous for employees to work in the power supply space due to the additional congestion.[62] It would also present danger to third party workers who may not be accustomed to working in close proximity to lethal voltages.[63] Pole top attachments also necessitate further, time consuming safety precautions when working around such attachments, which delays restoration time.[64] Furthermore, moving facilities higher on a pole substantially increases the wind loading on that pole.[65] For example, the static moment (stress) caused by windloading of an object attached at the top of a 45 foot pole would subject the pole to more than twice the stress caused by wind if the same object was attached at a height of 16 feet.[66]

While some utilities may safely allow wireless pole top attachments, it does not mean that such attachments are appropriate for all pole networks. Utilities should have discretion in determining whether to allow such attachments, and they should not have to petition the Commission every time that they wish to deny access to their pole tops for reasons of safety and reliability (as suggested by NextG Network).

3. The Burden and Presumption Proposed by NextG Network is Contrary to the Law and Commission Precedent

NextG Network's request would require utilities to affirmatively disprove an attacher's right to pole top access, which is contrary to the spirit and requirements of Section 224(f)(2) and the Commission's complaint proceeding rules. Section 224(f)(2) specifically gives utilities the

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62 *See* Angiullli Decl. at ¶ 11; Kennedy Decl. at ¶ 11.

63 *See id.*

64 *See id.*

65 *See* Kennedy Decl. at ¶ 11.

66 *See id.*

right to deny access for reasons of insufficient capacity, safety or reliability, without placing any prima facie burden on utilities to prove why access should be denied.[67] Under Section 224(f)(2) and the complaint proceeding rules, it is the attacher's obligation to challenge any denial of access. For example, Section 1.1402 of the Commission's Pole Attachment Complaint Procedures defines "complaint" as any filing "alleging that [the complainant] has been denied access to a utility pole, duct, conduit, or right-of-way in violation of this subpart and/or that a rate, term, or condition for a pole attachment is not just and reasonable."[68] Thus, the party being denied access must seek relief from the Commission – not the other way around. This allows utilities to enforce their safety and reliability standards in the normal course of business, while also allowing the Commission to determine on an *ad hoc* basis whether utilities are denying access in a discriminatory fashion.

B. Boxing and Bracketing

Fibertech's Petition specifically requests the Commission to "adopt a rule requiring utilities to allow the use of boxing and extension arms where (1) such techniques avoid pole replacement or make-ready work involving electrical facilities ...; (2) the facilities on the pole can be safely reached by a ladder or bucket truck; and (3) the pole owner has previously allowed use of the technique."[69] "Boxing" is the placement of communications wires on both sides of a pole line.[70] Fibertech's reference to the use of "extension arms" contemplates using standoff

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[67] *See Wireless Telecommunications Bureau Reminds Utility Pole Owners of Their Obligations to Provide Wireless Telecommunications Providers with Access to Utility Poles at Reasonable Rates*, 19 FCC Rcd 24930 (Dec. 23, 2004) (recognizing a utility's right to deny access for wireless antennae for the reasons set forth in Section 224 (f)(2)).

[68] *See* 47 C.F.R. § 1.1402(d).

[69] *Fibertech Petition*, p. 13.

[70] *See* Angiulli Decl. at ¶ 12; Freeburn Decl. at ¶ 11; Kennedy Decl. at ¶ 12.

brackets to obtain horizontal clearance for communications wires where there is not sufficient space to obtain vertical clearances. This practice is often referred to as "bracketing."[71]

The Florida IOUs prohibit boxing and bracketing in the communication space because of the impact it can have on the safety and reliability of the network.[72] Both practices, but boxing in particular, limit the use of climbing as a means of maintenance and repair.[73] Even where pole lines are technically accessible by bucket truck, there are still occasions on which the best means of accessing the specific facility in need of maintenance or repair is by climbing.[74] Boxing and bracketing slow down the process of pole change-outs, complicate transfers, and make both more costly.[75] For example, during a pole change-out, poles are typically "leaned" into the new hole.[76] If a pole line is "boxed," the leaning technique may not work, and it could be necessary to use a crane for purposes of lifting and guiding the new pole through the boxed line and into the new hole.[77]

C. Make-Ready Timelines

Fibertech urges the Commission to adopt strict deadlines within which a pole owner must perform all necessary make-ready work.[78] Specifically, Fibertech urges the Commission to require utilities to complete field surveys and identification of any necessary make-ready work within 30 days of receipt of a complete application and to finish make-ready work within 45 days

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71 *See id.*

72 *See id.*

73 *See id.*

74 *See* Angiulli Decl. at ¶ 12; Kennedy Decl. at ¶ 12.

75 *See* Angiulli Decl. at ¶ 12; Freeburn Decl. at ¶ 11; Kennedy Decl. at ¶ 12.

76 *See* Kennedy Decl. at ¶ 12.

77 *See id.*

78 *See Fibertech Petition*, pp. 16-18.

of receiving payment for the work.[79] While timelines might not be a problem for small jobs, the time to perform the make-ready work can vary significantly depending on many factors, some of which are beyond an electric utility's control (such as the speed at which other attachers move up or down on a pole, if a rearrangement is required). The Commission has declined to adopt such restrictive deadlines for make-ready work in the past.[80]

Unlike ILEC pole owners, the Florida IOUs are not in competition with CATV and CLEC attachers, and have no motivation to unnecessarily delay the attachers' access to their poles or to market. The fact that an attacher's access may be delayed is simply an unavoidable by-product of a process designed to ensure the safety and reliability of the electric distribution system. In fact, Fibertech's requested rule may not be aimed at electric utilities at all, since electric utilities stand to gain no competitive advantage.[81]

Make-ready timelines are particularly problematic when considered in conjunction with the position urged by CATVs that there is no such thing as "insufficient capacity."[82] This would not only require utilities to perform make ready at the request of attachers (in contradiction to the plain language of Section 224(f)(2)), but also would require that the work be completed within a narrow time frame. Either in tandem or isolation, such rules would result in a large, disruptive diversion of resources with a detrimental impact to system safety and reliability. The Florida

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79 *See id.*, p. 17.

80 *Petition of Cavalier Telephone LLC Pursuant to Section 252(E) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Arbitration*, Memorandum Opinion & Order, WC Docket No. 02-359, 18 FCC Rcd. 25887 at ¶¶ 140-142 (2003).

81 Fibertech's Petition, though not explicitly limiting its proposed rule to ILECs, appears to be aimed at resolving a competition issue which does not involve the Florida IOUs. *See* Fibertech Petition, pp. 16-18 ("ILECs act much more quickly when installing their own facilities, thereby achieving an unfair advantage in the competition to sign up customers for fiber-delivered services" and "ILECs typically do not wait 45 days before commencing their own construction, and pursue such construction expeditiously when it is for their own business purposes.")

82 *See* March 21, 2006 Letter from Christopher Fedeli to Marlene Dortch, *Notice of Ex-Parte Presentation in RM 11303*, on behalf of Joint Cable Operators.

IOUs and their customers can ill afford to elevate make ready timelines over the safety and reliability of the distribution system.

D. Use Of Third Party Contractors For Electric Make Ready

The *Fibertech Petition* urges the Commission to require pole access "to allow competitors to hire owner-approved contractors to perform field surveys, make ready determinations, and make ready work ...."[83] The Florida IOUs do not dispute that "owner-approved contractors" are capable of performing this work safely, including make ready work in the power supply space. However, this does not resolve the very real issue of resource diversion. Any contractor the Florida IOUs would approve to work in the power supply space would have to be a qualified power worker. Becoming a qualified power worker involves training and investment on the part of an electric utility. TECO's approval process, for example, involves an audit of the contractors safety program and requires that individual power workers complete a switching and tagging training program specific to TECO's system.[84] Once qualified, these contractors are valuable resources. If they are being hired at will by CATVs and CLECs, there will be fewer such workers available to perform work needed to achieve the core mission of the Florida IOUs – provision of safe and reliable electric service to its customers.

E. Manhole Access

The *Fibertech Petition* urges the Commission to adopt a rule allowing "utility-approved contractors to work in manholes without utility supervision" and to allow competitors to "survey manholes to determine availability of conduit."[85] A manhole is the top opening to an underground utility vault used to house an access point for making connections or performing

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83 *Fibertech Petition*, p. 19.

84 *See* Angiulli Decl. at ¶ 14.

85 *Fibertech Petition*, p. 5.

maintenance on underground and buried utilities.[86] Performing work in and around manholes and vaults creates unique safety and reliability concerns because of the sophistication of the underground network.[87]

Underground utility vaults are located within the critical network sections of the distribution system, which makes the systems particularly vulnerable to unplanned outages.[88] Further, the safety concerns in vaults are heightened because unlike overhead networks, the underground network does not have a "Communications Workers Safety Zone."[89] For these reasons, TECO does not even allow its own utility contractors to work in the manholes without supervision by trained TECO personnel.[90] The Florida IOUs request that the Commission decline Fibertech's request to allow *anyone* access to manholes without utility supervision.

F. Access to Utility Records

The *Fibertech Petition* also asks the Commission to adopt a rule which would allow third parties "to search utility records" in order to "determine availability of conduit."[91] Open access to such records raises serious safety and reliability concerns for at least two reasons. First, there may be conduit "space" shown in the records which either (a) does not exist due to the dynamic nature of the system, or (b) is reserved for emergency use by the electric utility (but not annotated as such). Second, and perhaps most importantly, critical information about vulnerable electric infrastructure could fall into the hands of the wrong people (terrorists and other public enemies). For these reasons, the Florida IOUs request that the Commission deny Fibertech's

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86 *See* Angiulli Decl. at ¶ 15.

87 *See id.*

88 *See id.*

89 *See id.*

90 *See id.*

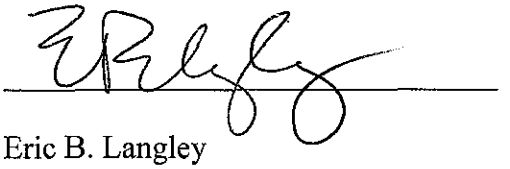
91 *Fibertech Petition*, pp. 24-29.

request, and permit electric utilities to safeguard this critical information and closely monitor access to this information.

VI. CONCLUSION

The Florida IOUs request that the Commission: (1) decline adopting general rules of applicability impacting electric distribution system safety, reliability, and engineering; and (2) allow electric utilities to resolve the problems of unauthorized attachments and the safety and reliability problem they create through enforcement of their pole attachment agreements in the courts. The Florida IOUs appreciate the opportunity to comment on these matters of great importance, and look forward to offering further comments and evidence in reply to the comments submitted by other interested parties.

Respectfully submitted,



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March 7, 2008

EXHIBIT 1

DECLARATION OF THOMAS J. KENNEDY P.E.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
Amendment of the Commission's Rules and	)	
Policies Governing Pole Attachments	)	RM-11293
	)	
	)	RM-11303

DECLARATION OF THOMAS J. KENNEDY, P.E.

1. My name is Thomas J. Kennedy. I am a Professional Engineer licensed in the State of Florida. I am currently employed by Florida Power & Light Company ("FPL") as Principal Regulatory Affairs Analyst in the Distribution Business Unit. I am FPL's Professional Engineer responsible for managing Joint Use. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity at FPL.

2. FPL's service territory area (reflected in the map attached as Exhibit A) contains approximately 27,650 square miles and has a population of approximately 8.5 million people. FPL serves approximately 4.5 million customers in 35 counties. More than 760,000 of FPL's 1.14 million distribution poles (almost 67%) have second (incumbent local exchange carriers ("ILECs")) and third party attachments. In total, about 1.16 million second and third party attachments exist on FPL's poles. These attachments were constructed by at least 16 different companies within their various (62 total) operating areas. FPL's mission as a Distribution business is "Certainty in Delivery" providing our customers safe and reliable electric service.

3. I have been responsible for FPL's joint use activities for 12 years and have been with FPL for 23 years. My joint use responsibilities include negotiating all new pole attachment agreements for Distribution, assisting in the establishment of pole attachment policies and processes for field personnel, providing agreement language interpretation and resolving field disputes, assisting with the oversight of pole attachment rate calculations, tracking and billing ILECs and telecommunication carrier attachments, ensuring compliance with pole attachment related Sarbanes Oxley requirements, complying with FCC and Florida Public Service Commission ("FPSC") regulatory requirements, legal and contractual requirements, budgeting and forecasting of pole attachment revenues and expenses, and ensuring that pole attachment related financial transactions are properly accounted for. Prior to my current role at FPL, I held the positions of FPL distribution planner, FPL transmission and distribution crew supervisor and FPL distribution design engineer.

4. My declaration is divided into three main categories. First, my declaration addresses certain specific issues impacting the safety and reliability of FPL's distribution system. Second, my declaration addresses the relationship between FPL and ILECs with whom FPL has joint use relationships. Third, my declaration addresses certain aspects of the FCC's cable and telecom rate formulas, as they relate to FPL. I offer this testimony in support of the initial comments filed by FPL in response to the FCC's Pole Attachment Notice of Proposed Rulemaking, WC Docket 07-245.

Safety and Reliability

5. FPL's overhead distribution construction standards (which include third-party attachment standards) are based on a number of different factors. These factors include, but are not limited

to, field experience, geography, climate, and distribution system studies. Our standards are not static. As we learn new lessons, these standards are routinely updated. For this very reason, FPL's pole attachment and joint use contracts include provisions that require attaching entities to comply with FPL's standards as revised from time to time.

6. In some instances, our standards exceed the requirements of the National Electric Safety Code ("NESC"). The NESC contains a good baseline for third party attachment standards. However, it would be harmful to the safety and reliability of the distribution system for the NESC be considered a "ceiling" on standards. The NESC Handbook itself recognizes that the NESC standards are not appropriate in every instance, and that "local conditions" may call for different practices. See NESC Handbook, p. 3 (6th ed. 2006). Further, the NESC is a safety code – not a construction code. Certain standards which exceed the NESC may exist for purposes of ensuring the reliability of the system, or for accommodating speedy service restoration, or for purposes of maintenance efficiency, or all of the above.

7. Under the storm hardening rules promulgated by the FPSC, FPL is required to maintain a Storm Hardening Plan (for submission/approval to the FPSC every three years). As part of the storm hardening plan, FPL is required to "maintain written safety, reliability, pole loading capacity, and engineering standards and procedures for attachments by others to the utility's electric transmission and distribution poles" which "meet or exceed" the NESC. Fla. Admin. Code, Rule 25-06.0342(5). The Storm Hardening Plan submitted by FPL contained standards (applicable to third party attachment and overhead construction, generally) which exceed the NESC. FPL's initial plan was approved by the FPSC by order PSC-07-1023-FOF-EL.

8. One distribution construction standard unique to FPL is our adoption of extreme wind loading ("EWL") standards for critical infrastructure (*e.g.*, facilities serving hospitals, 911 centers, police and fire stations, etc.) as well as new construction, major planned work, relocation projects, and daily work activities. This is an example of where our requirement exceeds the NESC minimum standards. FPL adopted EWL based on the storm history in its service territory, in conjunction with recommendations from a study commissioned by FPL to address system performance and reliability following the catastrophic 2004 and 2005 hurricane seasons.

9. FPL has a permitting process an attacher must follow before attaching to a pole which is set forth in the pole attachment agreements, as well as the third party attachment standards and procedures required by the FPSC. The fundamental purpose of these processes is to allow an opportunity to "pre-engineer" for the attachment in order to preserve the safety and reliability of the distribution system. The permitting process minimizes the incidence of clearance and loading violations, both of which can adversely impact the safety and reliability of the distribution system. Though the clearance requirements are of great importance, the loading requirements are of equal concern since these can impair the structural integrity of a pole line if not properly engineered. Overlashing, (lashing additional wires to the existing messenger cable wire) presents similar pole loading concerns (along with clearance concerns, particularly at mid span). The Communication Workers Safety Zone (sometimes called the "safety space") is 40 inches in most construction configurations.

10. The FPSC requires FPL to submit an annual Storm Preparedness Report which includes the number of unauthorized attachments detected through our system audits. FPL audits its system on a five-year revolving basis (20% of the system per year). Based on the data collected

in 2007 (for 20% of our system) and filed with the FPSC, there were 1,798 unauthorized attachments.

11. A categorical presumption in favor of wireless pole top access would impair FPL's ability to maintain the safety and reliability of its distribution system. Additional facilities in the power supply space (which includes pole tops) would make it more dangerous for FPL employees to work in the power supply space, due to the additional congestion. It would also present danger to third-party workers, who may not be as accustomed to working in close proximity to lethal voltages. Pole top attachments would also necessitate further time consuming safety precautions when working around such attachments. This would delay restoration times. Initial construction and regular maintenance likely would require either a temporary outage or coordination with FPL's dispatch centers for a temporary modified breaker relay setting (recloser off) that would trip a feeder for extra worker protection. This impacts reliability in at least two ways: (1) if the feeder trips while the recloser is off (*e.g.*, for something as simple as a tree branch brushing a power line), the electric customers served by that feeder are without power until it is determined that all workers, grounds, and equipment are verified to be in the clear; (2) this takes time away from our dispatchers or service restoration specialists who could be spending their time working on other service restoration projects. Additionally, there is risk of the pole top attachment (like an antenna) being damaged (such as by lightning, wind or debris) and falling into the conductor, which would cause an outage. Further, moving facilities higher on the pole can substantially increase the windloading on that pole. The static moment (stress) caused by windloading of any object on a pole increases proportionately with the height of that object. For example, an antenna placed at the top of a 45 foot pole would subject that pole to more than twice the stress caused by wind of the exact same antenna placed at 16 feet. FPL

generally allows wireless attachments in the communications space. The types of wireless attachments on our poles vary and there is no single or even standard configuration. To date, FPL has successfully worked closely with several wireless carriers to resolve pole top access requests. Ultimately, these carriers accepted installation of their antennas in the communication space and FPL is optimistic that these type of requests and issues will continue to be resolved in the future.

12. A categorical presumption in favor of boxing and bracketing would impair FPL's ability to maintain the safety and reliability of its distribution system and cause operational inefficiencies and increases in operational costs. "Boxing" is the placement of communications wires on both sides of a pole line. "Bracketing" is the use of a standoff bracket or extension arms for purposes of obtaining horizontal clearance for communications wires where there is not sufficient space to obtain vertical clearances. Both practices, but boxing in particular, limit the use of climbing as a means of maintenance and repair. Even where pole lines are technically accessible by bucket truck, there are still occasions on which the best means of accessing the specific facility in need of maintenance or repair is by climbing. Boxing and bracketing slow down the process of pole change-outs, complicate transfers, and make both more costly. For example, during a change-out, poles are typically lifted and leaned into the new hole. If a pole line is "boxed," the leaning technique may not work, and it could be necessary to use a crane for purposes of lifting and guiding the new pole down through the power supply space, through the boxed line and into the new hole. While construction techniques exist to work with these problems, they are all less efficient and more burdensome to the electric customer waiting to have their power restored. FPL feels this policy has not been a barrier for access to FPL poles.

ILEC Relationships

13. Because both ILECs and electric utilities own a significant network of poles, they have historically entered into contracts – typically called joint use agreements – to share infrastructure costs and to reduce pass-through costs to customers. Given the joint nature of these agreements, there is a level of mutuality that exists between ILECs and electric utilities that cannot, exist in relationships between CLECs and electric utilities. Joint use agreements typically place no make-ready or permitting requirements on either party for normal construction needs because the pole networks are engineered and constructed with joint use in mind. Perhaps most importantly, the joint use agreements give both ILECs and electric utilities responsibility for the safety and reliability of the joint use networks. This creates a mutually dependent relationship that necessitates fair treatment between the parties. Some of the agreements promote the mutual benefits of sharing each others poles, some state the use of space shall be based on the equitable sharing of the costs of joint use, while others even establish an objective percentage ownership. Joint use agreements are not "space rental" agreements, like the pole attachment agreements between electric utilities and third party attachers.

14. The major ILECs in FPL's service territory are Bellsouth Telecommunication, Inc. (d/b/a AT&T Florida, Inc.), Verizon, and EMBARQ. FPL's current joint use agreements with these entities date back to January 1, 1975. Since that time, there have been two amendments to the Bellsouth agreement (both addressing storm restoration and hardening issues), two amendments to the Verizon agreement, and two amendments to the EMBARQ agreement (the last coming in 1987). Joint use agreements are negotiated based on the concept of shared cost of pole ownership and this negotiation results in parity. "Parity" (or the "Objective Percentage Ownership" as it is sometimes called) is the negotiated balance of pole ownership between FPL

and the ILEC-counterpart. Sometimes contractual parity is based on relative network construction costs; sometimes it includes space allocation; sometimes it is based on the services provided (*i.e.*, right-of-way acquisition, lightning protection, vegetation maintenance, etc.); and sometimes it is based on a combination of all of these. While the objective percentage ownership of poles is not always explicit in every agreement, the equitable sharing and the costs and economics of joint use is included in all agreements and this responsibility is distributed very close to 50%/50%. If each party owns its objective percentage of jointly-used poles, no money changes hands on an annual adjustment basis. If one party's ownership is beneath its objective percentage, that party pays the other a per-pole-out-of-parity "adjustment rate." It is called an "adjustment rate" because its purpose is to encourage equity in ownership (maintaining one's objective percentage ownership).

15. FPL engineers and constructs its distribution system with joint use in mind. In other words, FPL may need only a 35 foot pole to meet its own service needs, but first discusses with ILECs the concept of joint use for the pole line being constructed. If the ILEC wants to share the benefits of joint use, the pole line is designed taller, perhaps with 40 foot poles, and stronger to accommodate joint use with its ILEC counterpart. The ownership of those poles is determined during that discussion. But for joint use (and the agreements which establish joint use) FPL would have constructed its distribution system for FPL's needs only. There would be no additional communication space and no communication worker safety space.

16. As of the last five-year audit cycle the actual relative ownership percentages in the distribution network are as follows:

ILECs 31% FPL 69%

These figures have not changed significantly since 1994. Though ILEC pole ownership has declined slightly, the change has averaged less than ½ % per year. The reason for this is that our ILEC counterparts simply do not set as many poles as FPL does. It is a business/operational decision on their part. It certainly is not something we are either forcing or encouraging.

17. In my tenure managing FPL's joint use, I have negotiated six joint use agreements (or letters of understanding, amendments, stipulations or renewals of agreements). Each of these contracts is different from the next, which reflects the different circumstances and business objectives of the respective parties. Some agreements focus on objective percentage ownership, some ILECs refuse to set certain types of poles (*i.e.*, concrete), while some ILECs demand more contractually allocated space than others. These negotiations are conducted at arm's length, with both parties having something the other needs – pole networks. From my perspective, there has been no change in the bargaining power between FPL and its ILEC counterparts.

Rate Formulas

18. FPL currently bills over 600,000 attachments at the FCC's cable rate, and over 65,000 attachments at the FCC's telecom rate. The attachments are virtually identical and, as far as FPL can tell, the services offered are functionally identical (even if offered through different technological platforms). Both types of attachments are generally secured to our poles with through-bolts, and both types of attachments generally occupy one-foot of the usable space on the pole and both place similar loading burdens on the pole.

19. In FPL's calculation of the telecom rate, we currently use the FCC's presumption of five average attaching entities (FPL's service territory is "urbanized"). We use this "conservative" presumption, even though it appears to not reflect reality. Because of the manner in which we

currently capture data in our five-year revolving audit, we cannot identify the number of attaching entities on any particular pole or any specific subset of poles. However, FPL's distribution system has about 1.14 million distribution poles and approximately 1.16 million second and third party attachments (excluding governmental attachments which are very few in number). This means, system wide, the average number of attachments per pole (including FPL) is slightly more than two (2). Further, this figure is somewhat inflated because it does not account for the many poles where a single attaching entity has multiple attachments on a pole (which would make the average number of attaching *entities* per pole lower than the average number of *attachments*). Even applying the total number of attachments (including FPL) to only the subset of poles with third party attachments, the average number of attachments is much less than three (3) (again, inflated because of the difference between an "attachment" and an "entity").

20. Generally, the poles with multiple attachments are in the most urbanized areas. They are typically taller and stronger poles, which cost more to install than the average pole, and are more costly to maintain. However, this costlier subset of poles is not used in developing the rate base used in the telecom formula. Instead, the telecom formula uses the entire distribution pole population, which includes poles that are shorter, cheaper to install, and cheaper to maintain. Thus, there is a glaring lack of symmetry in the application of the telecom rate.

21. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

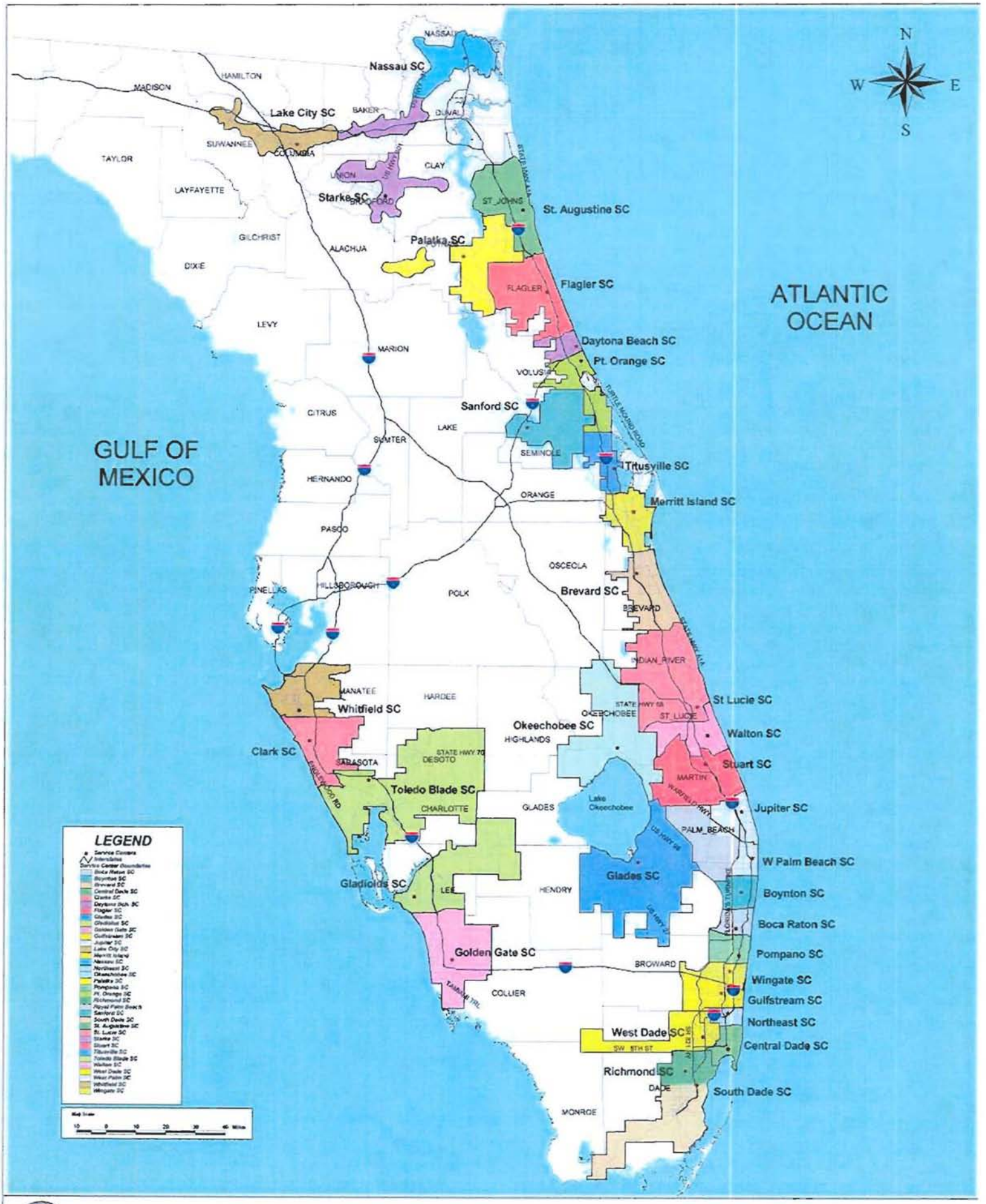
Executed on the 7th day of March, 2008.

Thomas J. Kennedy, P.E.
Principal Regulatory Affairs Analyst,
Florida Power & Light Company

EXHIBIT A

OF

DECLARATION OF THOMAS J. KENNEDY P.E.



FPL

SERVICE CENTER BOUNDARIES

GIS

EXHIBIT 2

DECLARATION OF KRISTINA L. ANGIULLI

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
Amendment of the Commission's Rules and	)	RM - 11293
Policies Governing Pole Attachments	)	RM - 11303
	)	
	)	

DECLARATION OF KRISTINA L. ANGIULLI

1. My name is Kristina ("Kris") Angiulli. I am currently employed by Tampa Electric Company ("TECO") as the Manager of Energy Delivery Construction Services. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity as Manager of Energy Delivery Construction Services for TECO.

2. TECO has supplied the Tampa Bay area with electricity since 1899. Its West Central Florida service area covers 2,000 square miles, including all of Hillsborough County and parts of Polk, Pasco and Pinellas counties. The company serves nearly 670,000 residential, commercial and industrial customers. TECO has approximately 312,500 distribution poles with over 212,000 distribution poles impacted by third party attachments (68%). There are approximately 324,000 attachments on Tampa Electric's system that have been added by about 30 different attaching entities.

3. I have been the Manager of Energy Delivery Construction Services for TECO for 2 years, and have been with the company for a total of 23 years. My job responsibilities as Manager of Energy Delivery Construction Services include government liaison and coordination for

government driven construction projects, distribution easements, underground facility protection and joint use. Specific responsibilities related to joint use include oversight over rate calculations, construction practices and the development of specs for joint use structures. My background includes underground cable locating and distribution field engineering.

4. My declaration is divided into three main categories. First my declaration addresses certain specific issues impacting the safety and reliability of TECO's distribution system. Second, my declaration addresses the relationship between TECO and the incumbent local exchange carriers ("ILEC's") with whom TECO has joint use relationships. Third, my declaration addresses certain aspects of the FCC's cable and telecom rate formulas, as they relate to TECO. I offer this testimony in support of the initial comments filed by TECO in response to the FCC's Pole Attachment Notice of Proposed Rulemaking, WC Docket 07-245.

Safety and Reliability

5. TECO's overhead distribution construction standards (which include third-party attachment standards) are based on a number of different factors. These factors include, but are not limited to, field experience, geography, climate, and distribution system studies. These standards are regularly revised and updated as company engineers and business personnel learn new lessons in the field and elsewhere. TECO has adopted a Grade B distribution construction standard.

6. One example where our standard exceeds the NESC is the separation requirement between the bottom of a transformer and the uppermost communications line. The NESC requires at least 30 inches of separation (so long as other clearances are met) but TECO requires 40 inches of separation. This 40 inch separation requirement exists for at least two reasons.

First, it makes the separation requirement consistent with most other communications/electric separation requirements (40 inches is the typical separation), thereby eliminating a potential layer of confusion. Second, TECO's transformer construction configurations differ slightly from some other utilities in so far as the secondary is generally installed at roughly the mid-point of the transformer can. The additional 10 inches of separation makes poles safer in the event the metallic transformer can, for some reason, becomes energized.

7. Under the storm hardening rules promulgated by the Florida Public Service Commission ("FPSC"), TECO is required to maintain a Storm Hardening Plan (for submission/approval to the FPSC every three years). As part of the storm hardening plan, TECO is required to "maintain written safety, reliability, pole loading capacity, and engineering standards and procedures for attachments by others to the utility's electric transmission and distribution poles" which "meet or exceed" the NESC. Fla. Admin. Code, Rule 25-06.0342(5). The Storm Hardening Plan submitted by TECO contained standards (applicable to third party attachments and overhead construction, generally) which exceed the NESC. TECO's initial plan was approved by the FPSC by order dated December 28, 2007 (Order No. PSC-07-1020-EPF-EI).

8. TECO has a permitting process an attacher must follow before attaching to a pole which is set forth in the pole attachment agreements, as well as the third party attachment standards and procedures required by the FPSC. The fundamental purpose of these processes is to allow an opportunity to "pre-engineer" for the attachment in order to preserve the safety and reliability of the distribution system. The permitting process minimizes the incidence of clearance and loading violations, both of which can adversely impact the safety and reliability of the distribution system. Though the clearance requirements are of great importance, the loading

requirements are of even greater concern since these can impair the structural integrity of a pole line if not properly engineered.

9. Overlashing (the practice of lashing an additional cable or fiber to the existing messenger and cable) presents similar pole loading concerns (along with clearance concerns, particularly at mid span). I have seen communication lines overlashed so many times that the bundle is more than 6 inches in diameter. The attached photographs are examples of such instances wind loading due to multiple overlashing can cause (and does) overloading and pole failures, and mid-span clearance violations because of the additional (un-engineered) sag at mid-span resulting from the additional weight on the line. Pre-notification of overlashing, and the opportunity to evaluate whether the pole line can handle the proposed overlashing, is essential from a system reliability perspective, and essential to meeting our FPSC mandate to perform pole strength and loading calculations prior to new burdens being placed on the pole.

10. The FPSC requires TECO to submit an annual Storm Preparedness Report which includes the number of unauthorized attachments detected through our system audits. TECO now performs audits on a 3 year cycle and has committed to that in our filing with the FPSC. TECO last performed a full audit in 2001. As a result of that audit, TECO detected over 26,000 unauthorized cable television attachments.

11. A categorical presumption in favor of wireless pole top access would impair TECO's ability to maintain the safety and reliability of its distribution system. Additional facilities in the power supply space (which includes pole tops) would make it more dangerous for TECO employees to work in the power supply space, due to the additional congestion. It would also present danger to third-party workers, who may not be as accustomed to working in close

proximity to lethal voltages. Pole top attachments would also necessitate further, time consuming, safety precautions when working around such attachments. Restoration time during or after storms could be impaired by these attachments. TECO generally allows wireless attachments in the communications space. These attachments vary in size, configuration and burden, unlike the typical wireline attachment.

12. A categorical presumption in favor of boxing and bracketing would impair TECO's ability to maintain the safety and reliability of its distribution system. "Boxing" is the placement of communications wires on both sides of a pole line. "Bracketing" is the use of a standoff bracket for purposes of obtaining horizontal clearance for communications wires where there is not sufficient space to obtain vertical clearances. Both practices limit the use of climbing as a means of maintenance and repair. Even where pole lines are technically accessible by bucket truck, there are still occasions on which the best means of accessing the specific facility in need of maintenance or repair is by climbing. Boxing and bracketing slow down the process of pole change-outs, complicate transfers, and make both more costly.

13. Make ready timelines might not be a problem for small jobs, but the time required to perform the make-ready work can vary significantly depending on many factors, some of which are beyond an electric utility's control. One of the key factors beyond TECO's control is the time it takes for other attachers to either rearrange or transfer. If TECO was forced to perform make ready within a certain period of time, it would interfere with our ability to meet our customers' needs, which is our first priority.

14. TECO does not have a safety objection to third party contractors working in the power supply space, so long as they are "qualified electric workers". In fact, TECO uses third party

contractors. The qualification process at TECO involves training and investment on TECO's part. TECO's approval process involves an audit of the contractors' safety program and requires that individual power workers complete a switching and tagging training program specific to TECO's system. Once qualified, these contractors are valuable resources. If they are being hired away by communications attachers, there will be fewer such workers available to perform work on TECO's behalf. If there is a shortage of trained workers, TECO's ability to maintain the reliability of its system is compromised and its ability to service its customers in a timely manner could be impacted.

15. A presumption allowing third-parties unsupervised access to utility manholes would comprises the safety and reliability of the underground networks. A manhole is the top opening to an underground utility vault used to house an access point for making connections or performing maintenance on underground and buried utilities. Underground utility vaults are located within the critical network sections of the distribution system, which makes the systems particularly vulnerable to unplanned outages. The safety concerns in vaults are heightened because unlike overhead networks, the underground network does not have a "Communications Workers Safety Zone." For these reasons, TECO does not even allow its own utility contractors to work in the manholes without supervision by trained TECO personnel.

ILEC Relationships

16. Because both ILECs and electric utilities own a significant network of poles, they have historically entered into contracts – typically called joint use agreements – to share infrastructure costs and to reduce pass-through costs to customers. Given the joint nature of these agreements, there is a level of mutuality that exists between ILECs and electric utilities that cannot exist in

relationships between CLECs and electric utilities. Joint use agreements give both ILECs and electric utilities responsibility for the safety and reliability of the joint use networks. This creates a mutually dependent relationship that necessitates fair treatment between the parties. Joint use agreements are not space rental agreements, like the pole attachment agreements between electric utilities and CLECs. The purpose is shared responsibility for the infrastructure. TECO engineers and constructs its distribution system with joint use in mind. In other words, TECO may need only a 35 foot pole to meet its own service needs, but constructs lines with 40 foot poles to accommodate joint use with its ILEC counterpart. But for joint use TECO would have constructed its distribution system differently.

17. The ILECs in TECO's service territory are Verizon and EMBARQ. TECO and Verizon, and their predecessors, have had a joint use relationship since the 1920's. The current version of the joint use agreement with Verizon dates back to 1961. Under the joint use agreement the party occupying the higher number of poles pays the other an annual rate for each "excess pole". As stated in the 1961 agreement, the relative ownership as of January 1, 1960 was 94% TECO and 6% Verizon. As of the most recent audit, the relative ownership was 92% TECO and 8% Verizon. (Verizon has actually moved closer to parity). The actual current relative pole ownership between TECO and Embarq is 95% and 5% respectively. Relative ownership between TECO and Embarq was the same in 1990. Shortly before TECO and Peninsular Telephone Company (a predecessor to Verizon) executed a joint use agreement in 1936, the relative ownership was 93% and 7%. TECO currently has facilities installed on 13,102 ILEC poles.

Rate Formulas

18. TECO's average number of attaching entities per pole (including TECO) is 2.08. This is the number we use in calculating the telecom rate.

19. The size, shape, construction and burden of wireless attachments are too varied and non-uniform to adopt and implement any uniform formulaic approach.

20. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the 7th day of March, 2008.

Kristina L. Angiulli

Kristina L. Angiulli
Manager, Energy Delivery Construction Services
Tampa Electric Company

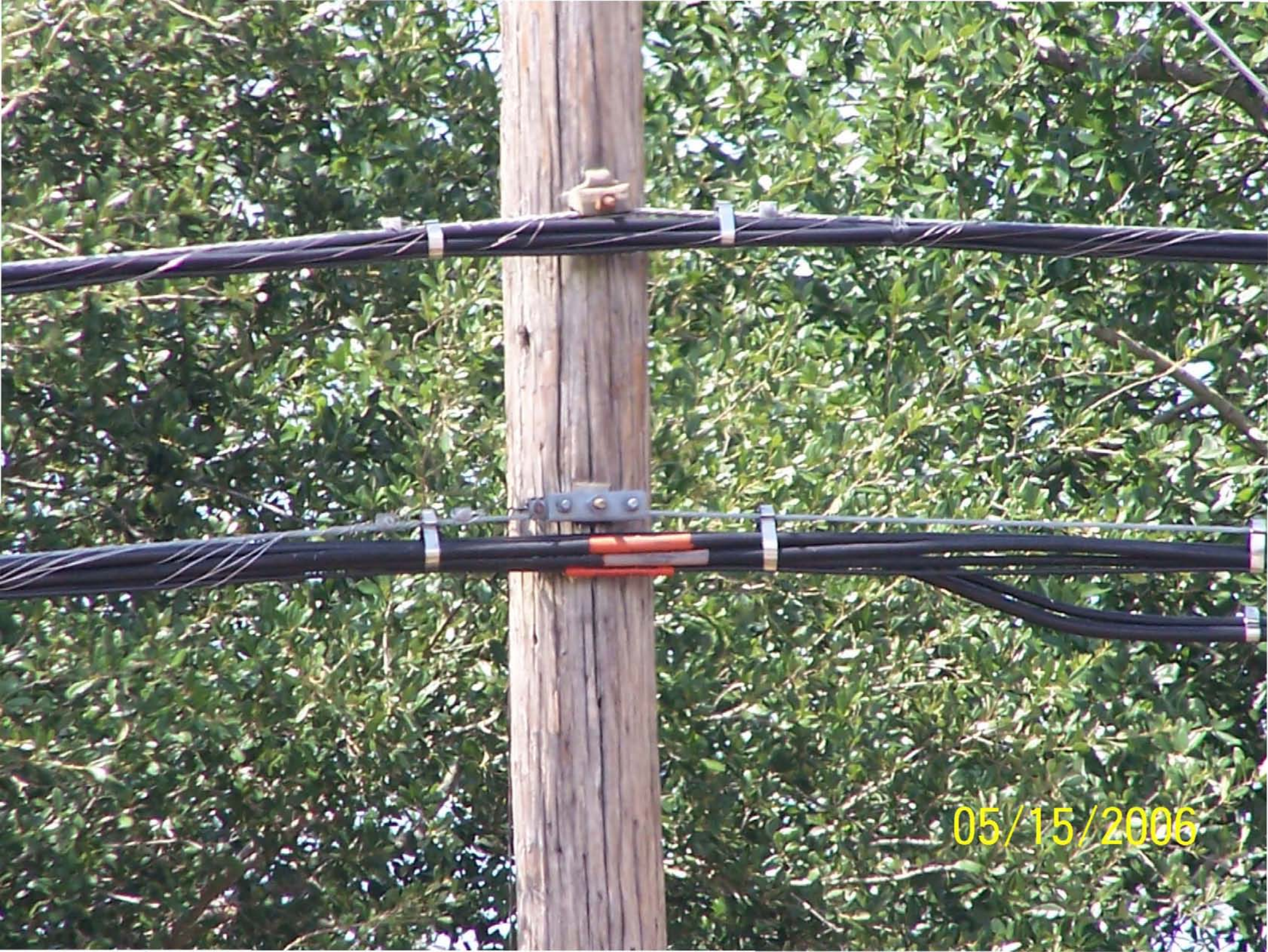

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EXHIBIT 3

DECLARATION OF SCOTT FREEBURN

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
Amendment of the Commission's Rules and	)	RM-11293
Policies Governing Pole Attachments	)	RM-11303
	)	
	)	

DECLARATION OF SCOTT FREEBURN

1. My name is Scott Freeburn. I am currently employed by Progress Energy Florida, Inc. ("PEF"), as the Manager of Joint Use and Locates. This declaration is based on my personal and professional knowledge, as well as knowledge available to me in my capacity as Manager of Joint Use and Locates for PEF.

2. PEF is an investor owned electric utility headquartered in St. Petersburg, Florida. PEF provides service to more than 1.7 million customers in a service area covering more than 20,000 square miles in 35 counties. The distribution plant consists of approximately 1.1 million poles with joint use attachments on 510,235 of those poles. PEF currently has 42 attachment agreements with cable companies, CLECs, and ILECs resulting in 737,123 attachments.

3. I have been the Manager of Joint Use and Locates for PEF for 4 years. My job responsibilities as Manager of Joint Use and Locates include negotiating agreements with pole attachment users, ensuring attachments are made according to applicable company and NESC standards, collecting associated pole attachment fees, managing attachment audits, providing daily management of contract field engineering crews, designing and negotiating new attachment

specifications for third - party radio and wireless phone attachments, maintaining GIS joint use data base, and staying current with and ensuring proper company representation at the state and federal level with regards to pole attachments issues. Other duties include working with the company's state and federal lobbyist to stay abreast of issues that could impact pole attachment rates and policy.

4. My declaration focuses on the safety and reliability issues raised in the FCC's Pole Attachment Notice of Proposed Rulemaking, WC Docket 07-245 ("NPRM"). I offer this testimony in support of the initial comments filed by PEF in response to the FCC's NPRM.

5. PEF's overhead distribution construction standards (which include third-party attachment standards) are based on a number of different factors. These factors include, but are not limited to, field experience, geography, climate, and distribution system studies. Our standards are routinely updated based on experiences, studies and "lessons learned." For this very reason, PEF's pole attachment and joint use agreements include provisions that require attaching entities to comply with PEF's standards "as may be amended or revised." Our contracts also require that the attaching party meet the stricter of the requirements, where there are differences. PEF has adopted a Grade B distribution construction standard.

6. In some instances, our standards exceed the requirements of the National Electric Safety Code ("NESC") for a variety of reasons. One such reason has to do with materials. From a materials management perspective, it is much more efficient to purchase limited types of hardware and equipment that can accommodate multiple construction applications. The ability to use one piece of hardware, tool, or electrical equipment for a variety of construction types

reduces inventory, engineering and construction cost. Another reason is to facilitate speed of restoration in the event of an outage.

7. Under the Florida Public Service Commission's ("FPSC") storm hardening rules, PEF is required to maintain a Storm Hardening Plan (for submission/approval to the FPSC every three years). As part of the storm hardening plan, PEF is required to "maintain written safety, reliability, pole loading capacity, and engineering standards and procedures for attachments by others to the utility's electric transmission and distribution poles" which "meet or exceed" the NESC. Fla. Admin. Code, Rule 25-06.0342(5). The Storm Hardening Plan submitted by PEF contains standards (applicable to third party attachment and overhead construction, generally) which exceed the NESC.

8. PEF has a permitting process an attacher must follow before attaching to a pole which is set forth in the pole attachment agreements, as well as the third party attachment standards and procedures required by the FPSC. The fundamental purpose of these processes is to allow an opportunity to "pre-engineer" for the attachment in order to preserve the safety and reliability of the distribution system. The permitting process minimizes the incidence of clearance and loading violations, both of which can adversely impact the safety and reliability of the distribution system. Though the clearance requirements are of great importance, the loading requirements are of even greater concern since these can impair the structural integrity of a pole line if not properly engineered. Overlashing, even though not technically considered an "attachment" by the Commission, presents similar pole loading concerns (along with clearance concerns, particularly at mid span).

9. PEF's pole attachment agreements require, upon discovery of unauthorized attachments: (1) payments of back rent, plus interest for five years or since the previous audit (whichever is shortest); and (2) a $25 fee for each unauthorized attachment in excess of ten attachments or 2% of the last verified total number of attachments (whichever is greater). This "2% "forgiveness" provision prevents attachers from paying a penalty charge merely because of minor counting discrepancies.

10. The FPSC requires PEF to submit an annual Storm Preparedness Report which includes the number of unauthorized attachments detected through our system audits. PEF audits its system every 5 years. PEF last performed a full audit in 2006. As a result of that audit, PEF detected 33,350 unauthorized attachments by CATV and CLEC's. Because these attachments were made without advanced permitting or post-inspection, many created clearance and loading violations that were detected years after the attachment.

11. A categorical presumption in favor of boxing and bracketing would impair PEF's ability to maintain the safety and reliability of its distribution system. "Boxing" is the placement of communications wires on both sides of a pole line. "Bracketing" is the use of a standoff bracket, or extension arm for purposes of obtaining horizontal clearance for communications wires where there is not sufficient space to obtain vertical clearances. Both practices, but (boxing in particular,) limit construction techniques which lead to delay in maintenance and restoration. Boxing and bracketing slow down the process of pole change-outs, complicate transfers, and make both more costly because workers are required to "work around" the boxed/bracketed pole.

12. Specific make ready timelines which apply to all jobs are not feasible. While a small make ready job can usually be completed within 45 days of payment, this is not always the case.

In many instances, the delays result more from trying to get the cooperation from other attachers (for example, to lower their attachment) than anything under PEF's control. While PEF uses the National Joint Utilities Notification System (NJUNS) process to notify our attaching customers that a transfer or removal is needed, those requests are often ignored. That non-response leads to further delays in the construction timeline. Large jobs are very difficult to complete in 45 days. We have had make ready projects which, through no foot dragging on our part, take more than six months.

13. The 2006 joint use pole attachment audit identified 13,223 stub poles in the PEF distribution system as of January 2007. These are wood distribution poles that were sawed off above the communication lines and left in the field because the communication companies did not remove or relocate their lines during normal construction timelines. Again, PEF utilizes NJUNS but no action was taken on behalf of the communication companies to remove or transfer their lines. All of the attachers on each of these sub poles received a transfer notification and a "Streets and Trips" mapping file in February 2007 giving them the exact locations of the poles requiring the transfer of cables. One year later, we have not heard back from any of the communication companies stating they have moved their facilities off of these stub poles. Many of these existing stub poles are rotten and in very poor condition. Some of these have fallen over, while others remaining standing solely because the phone and cable lines are supporting it. Many other stub poles now reside very close to road ways and create safety hazards for cars and pedestrians (as well as a potential liability).

14. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the facts set forth in this declaration are true to the best of my knowledge.

Executed on the 7th day of March, 2008.

Scott Freeburn
Manager of Joint Use and Locates
Progress Energy Florida, Inc.